Supreme Court, U.S.
FILED
05-892 JAN 17 2006
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,

Petitioners,

v.

GEORGE W. BUSH, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

In *Rasul v. Bush*, 542 U.S. 466 (2004), this Court held that aliens imprisoned at the Guantánamo Bay Naval Station ("Guantánamo") could challenge their captivity by *habeas corpus*. In March 2005, two Guantánamo prisoners, Abu Bakker Qassim and Adel Abdu' al-Hakim ("Petitioners"), filed for *habeas*, alleging that they were not enemy combatants.

The government ("Executive" or "Respondents") obtained a stay of the *habeas* action without informing the district court that they had already determined that Petitioners are not "enemy combatants." Petitioners' counsel asked the Executive whether it contended that the Petitioners are a threat to the security of the United States, but the Executive remained silent. Petitioners' counsel did not learn of this determination until July, 2005, when they were first permitted to visit the Petitioners in isolation cells at Guantánamo. Counsel then moved the district court for Petitioners' release. Belatedly conceding that the Petitioners are not "enemy combatants," the Executive asserted "the Executive's necessary power to wind up wartime detentions in an orderly fashion." On December 22, 2005, the district court correctly rejected this rationale, finding that "the detention of these petitioners has now become indefinite" and "is unlawful." However, the district court denied relief to the Petitioners, concluding that "a federal court has no relief to offer" people in Petitioners' limbo because of "obstacles [that] are constitutional and involve the separation of powers doctrine."

The Question Presented is whether the "the separation of powers doctrine" deprives a federal court of all power to grant relief to persons indefinitely and unlawfully imprisoned at Guantánamo.

PARTIES TO THE PROCEEDINGS

The Petitioners here and below are Abu Bakker Qassim and Adel Abdu' al-Hakim, refugees from the Xingjiang Uighur Autonomous Region of Western China, who are, and for more than three and one half years have been, imprisoned at Guantánamo Bay, Cuba.

The Respondents here and below are George W. Bush, President of the United States, Donald Rumsfeld, Secretary of the Department of Defense, Brigadier General Jay Hood, Commander, Joint Task Force GTMO, Guantánamo Bay, Cuba, Army Col. Brice Gyurisko, Commander, Joint Detention Operations Group, Guantánamo Bay, Cuba.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the district court (Pet. App. 1a-11a), ruling that the imprisonment of the Petitioners in Guantánamo Bay by the Executive branch "is unlawful," but that "a federal court has no relief to offer" Petitioners, is unpublished.

JURISDICTION

The district court's decision and final order were entered on December 22, 2005. Pet. App. 1a-11a. The notice of appeal to the United States Court of Appeals for the District of Columbia Circuit was filed on December 23, 2005, and was docketed in the court of appeals on December 28, 2005, as D.C. Circuit No. 05-5477. The Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

RELEVANT PROVISIONS OF LAW

The following constitutional and statutory provisions are relevant to this petition:

U.S. Const. art. II, § 1, cl. 1 states, in pertinent part:

> The executive Power shall be vested in a President of the United States of America.

U.S. Const. art. II, § 1, cl. 7 states:

> Before he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation: -- "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

U.S. Const. art. II, § 3 states, in pertinent part:

[The President] shall take Care that the Laws be faithfully executed . . . .

U.S. Const. art. III, § 1 states, in pertinent part:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution; the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . [and] to Controversies to which the United States shall be a Party . . . .

28 U.S.C. § 2241 states, in pertinent part:

(a) Writs of *habeas corpus* may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

. . . .

(c) The writ of *habeas corpus* shall not extend to a prisoner unless --

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> . . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

28 U.S.C. § 2243 states, in pertinent part:

> The [*habeas*] court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

STATEMENT OF THE CASE

A. The Underlying Facts

Petitioners are Uighurs, members of a Muslim minority who inhabit the Xingjiang Autonomous Region of far-western Communist China. The Uighurs have suffered under brutal communist rule.

On November 13, 2001, the President issued an order for the use of military force. *See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 FR 57833 (November 13, 2001).

In approximately December, 2001, Petitioners, while present in Pakistan, were sold by bounty hunters to United States forces and transported to a military facility at Kandahar, Afghanistan. Petitioners were held in prison in Afghanistan until approximately June, 2002. Pet. App. 1a. During his imprisonment there, Petitioner Hakim was advised that United States forces knew that he had been taken "by mistake."

Since June, 2002, Petitioners have been held in prisons at Guantánamo Bay. Pet. App. 1a. They were never charged with any wrongdoing nor designated for any military tribunal.

B. The Combatant Status Review Tribunals

On June 29, 2004, this Court issued its ruling in *Rasul v. Bush*, 542 U.S. 466 (2004). Nine days later, the Department of

Defense established "Combatant Status Review Tribunals" ("CSRTs"). "Enemy combatant" was defined as:

> an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Order Establishing Combatant Status Review Tribunals, issued by Deputy Secretary of Defense Paul Wolfowitz (July 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf ("Wolfowitz Order").

The Wolfowitz Order provides: "Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session whether the detainee is properly detained as an enemy combatant." Wolfowitz Order, ¶ g(12). It continues:

> *Non-Enemy Combatant Determination.* If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall be forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with the domestic and international obligations and the foreign policy of the United States."

Wolfowitz Order, ¶ i.[1]

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[1] Following the hearing, the presiding officer must mark the following sentence appropriately: "The Tribunal has determined that he (is) (is not) designated as an enemy combatant . . . ."

C. The Petitioners' CSRT Hearings

Sometime in late 2004 or early 2005, Respondents conducted separate CSRT hearings for each Petitioner. Pet. App. 1a-2a. Respondents kept the results secret until July 29, 2005, when they conceded that "the CSRTs determined petitioners should no longer be classified as enemy combatants on March 26, 2005." In later papers, the Executive tried to suggest from the finding that Petitioners should no longer be *classified* as combatants that they once *were* combatants. The district court rightly deemed this "Kafkaesque." Pet. App. 5a. As is plain from the definition of "enemy combatant" in the Wolfowitz Order, the finding can only mean that the Petitioners *never* were enemy combatants. The Executive offered the district court no evidence to the contrary. Pet. App. 4a-6a.

D. The District Court Proceedings

On March 10, 2005, the petitions for writs of *habeas corpus* were filed. Pet. App. 2a. Four days later, the Executive moved to stay the case until appeals involving other Guantánamo prisoners were resolved by the court of appeals. *Id.*[2] Petitioners' counsel asked the Executive whether it alleged that Petitioners were enemy combatants. *Id.* The Executive never responded, and on March 29, 2005 advised the district court that "[a] factual record for a petitioner in a Guantánamo Bay detainee case

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Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Bay Naval Base, Cuba, issued by the Secretary of the Navy Gordon England (July 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

[2] The tactics employed by the Executive, along with the uniform refusal, after February, 2005, of the judges of the district court to adhere to *Rasul*'s plain mandate to "consider the merits" of the petitions, *see* 542 U.S. at 485 and discussion, *infra*, has prolonged the Executive's unlawful imprisonment in this case and in hundreds of other Guantánamo cases.